



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

November 17, 2014
OM 14-36

Mr. Lawrence J. Fitzmorris

Re: Fitzmorris v. Portsmouth Town Council

Dear Mr. Fitzmorris:

The investigation into your Open Meetings Act ("OMA") complaint filed against the Portsmouth Town Council ("Town Council") is complete. By correspondence dated May 15, 2014, you allege the Town Council violated the OMA during its April 1, 2014 meeting. You allege the Town Council convened into executive session for an improper purpose. More specifically, you allege the Town Council convened into executive session under R.I. Gen. Laws § 42-46-5(a)(2) for litigation, but you contend that since all the parties to the litigation were present, the meeting should have occurred in open session.

In response to your complaint, we received a substantive response from the Town Council's legal counsel, Kevin P. Gavin, Esquire. Attorney Gavin states, in pertinent part:

"On April 1, 2014, the Portsmouth Town Council, at the request of Director Janet Coit of the Rhode Island Department of Environmental Management ('DEM'), met in executive session with DEM officials and its legal counsel, to discuss litigation which is pending in the DEM's Administrative Adjudication Division involving a Notice of Violation issued by DEM against the Town of September 15, 2010 * * *. Director Coit requested the meeting in order for DEM officials to discuss with the Town Council issues relating to the potential settlement of the litigation.

* * *

The item was posted as an executive session pursuant to 'RIGL 42-46-5(A)(2) – Litigation: Meeting with RIDEM re: Wastewater/Sewers NOV Proceedings.' * * *

The OMA provides that '[a] public body may hold a meeting closed to the public pursuant to § 42-46-4 for one or more of the following purposes:

* * *

(2) Session pertaining to . . . Litigation, or work sessions pertaining to . . . litigation.'

R.I. Gen. Laws § 42-46-5(a)(2)

Mr. Fitzmorris contends 'that as both parties to the litigation cited were present in executive session, it was not possible to preserve litigation strategies and therefore the justification for secrecy was absent.' For this reason, Mr. Fitzmorris alleges that the statutory exception for sessions pertaining to litigation did not apply and, therefore, the meeting was held in violation of the OMA. The Town respectfully disagrees.

There is no question that the April 1, 2014 meeting was a 'session pertaining to litigation.' There is nothing in the statute to suggest that the litigation exception under § 42-46-5(a)(2) is limited to sessions involving discussions of litigation strategy or communications protected by the attorney-client privilege. There is nothing in the statute that prohibits a public body from having executive session under § 42-46-5(a)(2) to meet with another party to a litigation matter, in order to explore a potential settlement of the litigation.

* * *

The OMA and the litigation exception under § 42-46-5(a)(2) must be applied in accordance with the plain language of the statute, as enacted by the General Assembly. The prohibition suggested by Mr. Fitzmorris does not exist in the statute, in any fashion.

Furthermore, there is a strong public policy to encourage the voluntary settlement of litigation. * * * This policy would be thwarted if settlement meetings, such as the April 1, 2014 meeting of the Town Council with DEM Officials, were required to be held in open session. If the parties to a litigation matter were unable to have a frank and confidential discussion, such meetings would rarely, if ever, occur."

We acknowledge your reply dated June 20, 2014.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment regarding whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General

Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

You state that the executive session citation used by the Town Council “appears, on the face of the cited paragraph, to meet the requirement of an exemption to the requirement of an open meeting.” You further “point out that the citations for ‘litigation’ and ‘session[s] pertaining to litigation’ lack any definition at all.” Despite the foregoing, you suggest that the instant executive session “does not, however, meet the fundamental intent of the law.” Respectfully, even though you indicate that the citations “lack any definition at all,” you seek to interpret these provisions as applying only to those communications that are privileged in nature. Because this interpretation is at odds with the plain meaning of “litigation,” we find no violation.

We look to the plain language of the statute to properly analyze this provision. On numerous occasions, the Rhode Island Supreme Court has explained that “when the language of a statute is clear and unambiguous, [the] Court must interpret the statute literally and must give the words of the statute their plain and ordinary meaning in establishing and effectuating statutory intent.” Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). Furthermore, when we examine an unambiguous statute, “there is no room for statutory construction and we must apply the statute as written.” In re Denisewich, 643 A.2d 1194, 1197 (R.I. 1994).

The Black’s Law Dictionary, 6th Edition defines “litigation” as “legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest, a judicial controversy, a suit at law.” Other dictionaries provide similar interpretations. For instance, The Merriam-Webster On-Line Dictionary defines the word “litigate” as “to cause (a case, an issue, etc.) to be decided and settled in a court of law.” Notably, none of these definitions adopt the definition you suggest.

As the Town Council’s legal counsel proffers, there is nothing contained within R.I. Gen. Laws § 42-46-5(a)(2), or the plain definition of “litigation,” that suggests this exemption is limited to discussions that are privileged in nature. Rhode Island General Laws § 42-46-5(a) states “[a] public body may hold a meeting closed to the public * * * for one or more of the following purposes.” One such purpose is contained in (a)(2), which states: “[s]essions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation.” (Emphases added). As indicated supra, this Department must interpret and enforce the OMA as the General Assembly has written this law. If the General Assembly had intended to allow public bodies to enter into executive session under R.I. Gen. Laws § 42-46-5(a)(2) only for discussions that were of a privileged nature or involved attorney-client communications, the General Assembly clearly could have included such language. This Department is duty bound to follow the law as written and because R.I. Gen. Laws § 42-46-5(a)(2) contains broad terms such as “litigation” and “work sessions pertaining to * * * litigation,” we must respectfully reject your claim that R.I. Gen. Laws § 42-46-5(a)(2) should be limited to only privileged communications between attorneys and their clients.

Accordingly, we conclude that the meeting of the Town Council in executive session with DEM officials and its legal counsel to discuss litigation which, at the time, was pending in the DEM’s

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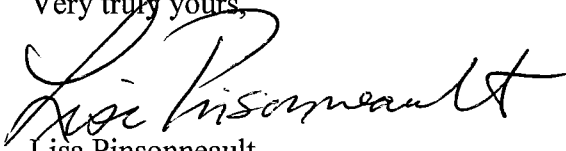
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Administrative Adjudication Division involving a Notice of Violation issued by DEM against the Town was an appropriate topic pursuant to R.I. Gen. Laws § 42-46-5(a)(2). In this respect, it must be noted that you make no argument that the matter discussed did not involve "litigation," but instead argue that the matter discussed did not involve privileged communications. As such, we find no OMA violation.

Although this Department has found no violations, nothing within the OMA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 42-46-8(c). The OMA allows the complainant to file a complaint within ninety (90) days from the date of the Attorney General's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later. See id. Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Lisa Pinsonneault", written in dark ink.

Lisa Pinsonneault

Special Assistant Attorney General

Extension 2297

Cc: Kevin P. Gavin, Esquire